No. 94.

Brf. of Wright for Appellees

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 94

JAMES L. UTTER AND ELIZABETH B. VOORHIES,
APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR, AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

(16,556.)

BRIEF OF APPELLEES.

(16,556.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 777.

JAMES L. UTTER AND ELIZABETH B. VOORHIES, APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR, AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

I.

STATEMENT OF CASE BY APPELLEES.

This is a petition for a mandate to the Loan Commissioners of the Territory of Arizona, compelling them to fund certain alleged bonds of Pima County into the bonds of the Territory.

Appellants claim, that by virtue of the Act of Congress, approved June 6, 1896, it is made the duty of appellee to fund said alleged bonds simply on the request of the owners thereof.

It will be noted that they do not allege that the authorities of Pima County have ever demanded the funding of these bonds; and it will further be noted that the allegations of appellants' petition proceeds on the simply theory that, on demand made on appellee to fund these bonds by the owners thereof, it then

becomes the duty of appellee to fund them, their act not being one of discretion, but simply to obey the demand to fund when made by the owner.

To this petition a demurrer was filed, and by the Supreme Court of the Territory sustained and the petition dismissed.

This ruling was placed, in the oral opinion of the court, on the ground that appellees were instructed by said Act of Congress to fund the "outstanding obligations" of the county "upon the official demand of said authorities" of the county; and that, as these alleged bonds are not an "outstanding obligation" of the county; and that, as the authorities of the county have not demanded that they be funded, therefore, no duty existed in appellee to fund them.

II.

THE FUNDING LAW AND ITS AMENDMENTS:

Sec. 10 of the Act referred to contains the only authority for funding county indebtedness by the Loan Commission, and is in these words:

> The Boards of Supervisors of the Counties, the municipal and school authorities, are hereby authorized and directed to report to the Loan Commission of the Territory their bonded and outstanding indebtedness, and said Loan Commission may, on written demand, require an official report from the Board of Supervisors, the municipal or school authorities, of the bonded and outstanding indebtedness, and said Loan Commission shall provide for the redeeming or refunding of the county, municipal and school district indebtedness UPON THE OFFICIAL DEMAND OF SAID AUTHORITIES in the same manner, etc.

It will thus be seen that, as a condition precedent to the funding of county indebtedness into Territorial bonds, the Board of Supervisors must first make an "official demand" on the Loan Commission so to do. Until this official demand is made, they not only do not have the power so to do, but this power is very clearly reserved from them; and this for the very simple reason that the counties have the right to fund their indebtedness or not as they see fit,—a right I submit, that cannot be taken from them by any legislative body.

On August 3, 1894, this funding Act was amended; but the amendment only goes to the extent of permitting the expense indebtedness of the Territory incurred between Dec. 31, 1894, and Dec. 31, 1895, to be funded. It does not therefore in any way touch upon any of the questions involved herein.

The second amendment is the Act of June 6, 1896, and is the Act on which petitioners rely, and contains these words (after referring to the foregoing Act and amendment)

*** are hereby amended and extended SO AS TO AUTHORIZE the funding of all OUTSTANDING OBLIGATIONS of said Territory and the counties, municipalities, and school districts thereof, AS PROVIDED IN THE ACT OF CONGRESS APPROVED JUNE 25, 1890, until January 1, 1897.

I submit that it follows from this that this Act is simply an authority to fund the indebtedness of the county, provided it be done "as provided in the Act of Congress approved June 25, 1890." As we have seen that Act provided that it might be done on the "official demand" of the county first being made so to do.

III.

IF THE ACT IS MANDATORY THEN IT IS VOID:

But, if it be said, that the Act relied upon is mandatory, that it commands the funding of this alleged indebtedness, whether the County wishes it or not, then, I insist, that the Act is wholly void, for in such case it is not an act to cure irregularities whereby an existing contract may be enforced, but is an act creating a contract.

It cannot be successfully contended that the bonds petitioners seek to have funded is the same contract that the funding bond would evidence, for in the latter contract the principal sum agreed to be paid, are each different, and, therefore, while the consideration may be the same, the old debt is paid, and a new one is created. It follows, therefore, that if Congress has the power to compel the making of this new contract, whether the County wishes it or not, then Congress has the power to make a contract which the principals did not make for themselves.

Cooley Const. Lt., p. 368.
Hasbrouck v. Larned, 13 Wis., 37.
Milford v. Larned, 16 Mass., 216.
Shonk v. Brown, 35 Mo. 174.

IV.

BUT THESE BONDS ARE NOT INCLUDED IN THIS ACT.

I CONTEND THAT THE ACT IN QUESTION MAKES NO ATTEMPT TO MAKE A CONTRACT AND THAT IT DOES NOT INCLUDE THE BONDS IN

QUESTION AT ALL; FOR IT EXPRESSLY CENFINES THE AUTHORITY IT GRANTS TO THE FUNDING OF ALL "outstanding obligations" of said Territory, and the Counties, etc.

Are these bonds "outstanding obligations" of Pima county?

In the case of Lewis v. Pima County, (155 U. S. 54) speaking of these bonds, the court says:

Now, unless a debt thus incurred in aid of the construction of a railroad can be said to be an obligation "necessary to the administration of the internal affairs" of Pima county, IT MUST NECESSARILY FOLLOW, irrespective of every other consideration, that the legislature exceeded its powers in authorizing and requiring the County to issue its bonds in exchange for those of the railroad company in question, AND THAT THE BONDS ARE VOID.

The Court then held that the legislature had no authority to authorize and require the County to issue these bonds.

Can it be said that a void bond is an outstanding obligation?

In construing this statute one must not overlook the fact that, if it is to be applied to the case at bar, that it is retroactive, and as such it must "be subjected to the most circumscribing construction *that can possibly be made consistent with the intention of the legislature.*"

3 Enc. of L., p. 758.

Can it be said that Congress intended the Loan Commission to fund bonds that have been declared void by the highest court in our land? bonds too that have not an atom of equity in them? bonds that were not in the minds of Congress when the act was passed?

How can this court so conclude?

Petitioner points out to us the Memorial of our legislature asking Congress to validate these bonds. It is to be presumed that the Act in question was passed by Congress in answer to this solemn and dignified request. Therefore, to examine this memorial will show what was before Congress when it acted, and what it thought it was doing in acting. This Memorial does not include these—bonds,—it does not specifically refer to them, nor does it by implication refer to them, but by implication excludes them.

See Memorial, Sess. Laws, 1895, p. 148.

If, therefore, a retroactive law is to be construed as I have said, if the Act under consideration provides for only funding the "outstanding obligations" of the County, and if these bonds had, at the time of the passage of the Act, been declared void by the highest court in the land, then by virtue of what can this court say that it was intended to include these bonds in the Act? I submit that it cannot be done and was never intended to be done, and if it was done, it was not done by Pima county.

V.

THESE BONDS, BEING WITHOUT EQUITABLE CONSIDERATION, AND THEIR INVALIDITY NOT BEING CAUSED BY ANY IRREGULARITY, CANNOT BE VALIDATED BY CONGRESS.

These bonds, as already shown, have been declared void. There being no irregularity in their issue, but, instead, they were issued in obedience to the command of the legislature, it follows, therefore, that they are not, and never were, an existing contract, and no benefit whatsoever has ever been received by the County from them.

In the cases where courts have had retroactive and curative statutes under consideration that have been sustained the dominating and potential reasons therefor as emphasized by the courts are:

1. That thay are simply acts to cure irregularities, so that an existing contract may be enforced; and

2. That in all such cases it would be obnoxious to conscience if the contract was not enforced.

Thompson v. Perrins, 103 U. S., 617,
Randall v. Kruger. 23 Wall. 149,
Reed v. Plattsmouth, 107 U. S. 575,
New Orleans v. Clark, 95 U. S. 652,
Granada County v. Horgdan, 112 U. S. 272,
Dentzel v. Woldie, 30 Cala. 145,
Otos County v. Baldwin, 111 U. S. 15.

VI.

HAS NOT OUR DEFENSE RIPENED INTO A VESTED RIGHT?

If the statute of limitations bars a claim, all courts hold that this is a defense that is a vested right, and cannot, therefore,

be taken away by legislation
new contract.

"So, he who was never
cannot have a demand creat
enactment." (Ibid.)

Why, then, does it not f
bonds that have been resiste
not a cent has ever been pai
in the land has solemnly de
which means that they are
which means that they do n
tract, can Congress legislate
contract where none existed
ane give it to these petition

To hold that such is th
be given the effect and force
claim less is to defeat their
holding that the demurrer i

ion; for to do so would be to create a

Cooley Const. Lt. 369.

er bound, either LEGALLY OR EQUITABLY, eated against him by mere legislative

t follow, that in the case of these bonds, isted from the date of their date, where paid on them, where the highest court declared that they were and are void, e not the bonds of the county, and o not stand for or evidence any con- ate into these void bonds life, make a ted, and take the money of the County oners?

the result of this Act of Congress, if it rce that petitioners claim for it, and to ir action, is the necessary result of r in this case shall be overruled.

Respectfully submitted,

C. W. WRIGHT,
For Appellees.